IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

SEBASTIAN P. LABELLA,
Airman First Class (E-3),
United States Air Force,
Appellant.

USCA Dkt. No. 15-0413/AF

Crim. App. Dkt. No. 37679

PROPOSED BRIEF OF *AMICUS CURIAE*
UNITED STATES AIR FORCE APPELLATE DEFENSE DIVISION

ISAAC C. KENNEN, Major, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 34153
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762-6604
(240) 612-4770
isaac.c.kennen.mil@mail.mil

BRIAN L. MIZER
Senior Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 33030
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762-6604

PATRICK J. WELLS, Colonel, USAF
Chief, Appellate Defense Division
U.S.C.A.A.F. Bar No. 30364
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762-6604

Counsel for *Amicus Curiae*

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee,*	)	**PROPOSED BRIEF OF *AMICUS CURIAE* UNITED STATES AIR FORCE APPELLATE DEFENSE DIVISION**
v.	)	
	)	USCA Dkt. No. 15-0413/AF
SEBASTIAN P. LABELLA, Senior Airman (E-4), United States Air Force, *Appellant.*	)	Crim. App. Dkt. No. 37679

TO THE HONORABLE JUDGES OF THE
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

COMES NOW, the United States Air Force Appellate Defense Division, upon a motion contemporaneously filed with this brief under Rule 26(a)(3) of this Honorable Court's Rules of Practice and Procedure, and offers this brief as *amicus curiae* in support of Appellant, Airman First Class Sebastian LaBella.

Issue Specified by the Court

WHETHER APPELLANT'S PETITION FOR GRANT OF REVIEW SHOULD BE DISMISSED FOR LACK OF JURISDICTION WHEN THE COURT OF CRIMINAL APPEALS ENTERTAINED AN UNTIMELY FILED MOTION FOR RECONSIDERATION FOR "GOOD CAUSE," BUT DENIED THE MOTION ON OTHER GROUNDS, AND APPELLANT FILED A PETITION FOR GRANT OF REVIEW WITH THIS COURT UNDER ARTICLE 67, UCMJ, MORE THAN 60 DAYS AFTER THE ORIGINAL DECISION OF THE COURT OF CRIMINAL APPEALS, BUT WITHIN 60 DAYS OF THE FINAL DECISION ON THE MOTION FOR RECONSIDERATION. SEE, UNITED STATES V. RODRIGUEZ, 67 M.J. 110 (C.A.A.F. 2009); UNITED STATES V. SMITH, 68 M.J. 445 (C.A.A.F. 2010).

Statement of Statutory Jurisdiction

Whether jurisdiction exists is the issue specified by this Court and is addressed by *amicus curiae* in the argument below.

Statement of the Case and Statement of Facts

Amicus curiae adopts the statement of the case and statement of facts in Appellant's 15 June 2015 brief.

Argument on Specified Issue

APPELLANT'S PETITION FOR GRANT OF REVIEW SHOULD NOT BE DISMISSED FOR LACK OF JURISDICTION AND THIS COURT SHOULD OVERTURN *UNITED STATES V. RODRIGUEZ*, 67 M.J. 110 (C.A.A.F. 2009) IN LIGHT OF *UNITED STATES v. KWAI FUN WONG*, 135 S. CT. 1625 (2015), *GONZALEZ v. THALER*, 132 S.CT. 641, 648 (2012), and *HENDERSON EX REL. HENDERSON v. SHINSEKI*, 562 U.S. 428, 435 (2011).

Standard of Review

Whether the provision in Article 67(b)[1] permitting an accused to petition this Court for a grant of review within 60 days of the decision of a Court of Criminal Appeals (CCA) is merely a statutory claim-processing rule, or instead is a clear Congressional statement stripping this Court of Article 67(a)(3)[2] jurisdiction, is a question of law reviewed *de novo*. *See, e.g., United States v. Henderson*, 59 M.J. 350, 352 (C.A.A.F. 2004).

Law and Argument

The three bases for subject matter jurisdiction before this Court are delineated in Article 67(a): 1) cases where the death penalty is adjudged; 2) cases certified to this Court by a service Judge Advocate General; and, germane to Appellant's case, 3) cases where an Appellant petitions and shows good cause for the review of a CCA decision. Article 67(b) provides that an

[1] UCMJ, 10 U.S.C. § 867(b) (2012)
[2] UCMJ, 10 USC § 867(a)(3) (2012)

Appellant "may" invoke this Court's aforementioned jurisdiction by filing a petition for review within 60 days of notice, or constructive notice, of a CCA's decision.

In *Rodriguez*, this Court held that the 60 day provision in Article 67(b) was a jurisdictional bar to accepting a petition for review filed after more than 60 days has passed from notice or constructive notice of the CCA decision. 67 M.J. at 111. However, *Rodriguez* did not account for the fact that the Supreme Court has "[t]ime and time again . . . described filing deadlines as 'quintessential claim-processing rules,' which 'seek to promote the orderly progress of litigation,' but do not deprive a court of authority to hear a case." *Kwai Fun Wong*, 135 S. Ct. at 1632. The *Rodriguez* decision did not employ the required "rebuttable presumption that such time bars may be equitably tolled." *United States v. Kwai Fun Wong*, 135 S. Ct. 1625 (2015). The Supreme Court found the presumption that a time limit is not jurisdictional exists "even when the time limit is important (most are) and even when it is framed in mandatory terms (again most are); indeed, [a limit is not jurisdictional] 'however emphatically' expressed those terms may be." *Id.* Further, Supreme Court has ruled: "Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it." *Id.*; *see also Gonzalez v. Thaler*, 132 S.Ct. 641, 648-49 (2012) ("We accordingly have applied the following

principle: A rule is jurisdictional if the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional. But if Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional.") (internal quotes and cites omitted).

The *Rodriguez* decision erred, then, because it did not start its analysis of the question of jurisdiction from the position required by *Kwai Fun Wong*. Instead, the *Rodriguez* decision relied on *Bowles v. Russell*, 551 U.S. 205 (2007) to find the language in Article 67(b) was jurisdictional. *Bowles* held that the clear language found in 28 USCS § 2107 ("no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree") divested an appellate court of jurisdiction after a 30 day time limit had passed. See *Bowles*, 551 U.S. at 205-215. The *Rodriguez* decision took *Bowles* to stand for a proposition broader than its language supports.

Specifically, the *Rodriguez* decision read *Bowles* in a manner that did not account for the need to distinguish "between truly jurisdictional rules, which govern 'a court's adjudicatory authority,' and nonjurisdictional 'claim processing rules,' which do not." *Gonzalez*, 123 S.Ct. at 648 (citing *United States v. Kontrick v. Ryan*, 540 U.S. 443, 454-55 (2004)). The language in

28 USC §2107 that was at issue in *Bowles* clearly addressed the adjudicatory powers of a court: "no appeal shall bring any judgment ... unless [an] appeal is filed, within thirty days." By contrast, there was (and is) no such language constraining the adjudicatory power of this Court found in Article 67(b).

The *Rodriguez* decision's failure to distinguish between claims processing rules and rules that on their face constrain a court's adjudicatory authority led it to misapply *Bowles*. Further, the *Rodriguez* decision gave inadequate consideration to the fact that "the consequences that attach to the jurisdictional label may be . . . drastic[.]" *Shinseki*, 562 U.S. at 435. Speaking to those consequences, the Supreme Court has cautioned:

> Subject-matter jurisdiction can never be waived or forfeited. The objections may be resurrected at any point in the litigation, and a valid objection may lead a court midway through briefing to dismiss a complaint in its entirety. 'Many months of work on the part of the attorneys and the court may be wasted.' Courts, we have said should not lightly attach those 'drastic' consequences to limits Congress has enacted.

Gonzalez, 132 S.Ct. at 648.

It is possible the *Rodriguez* decision's misapplication of *Bowles* was due to the fact that the Supreme Court had not yet rendered a litany of cases designed "to bring some discipline to the use of [the] term [jurisdictional]." *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011). The precedents of *Kwai Fun Wong*, *Shinseki*, and *Thaler*, have instilled that discipline and now require courts to look at the plain text of a statute to see if

Congress "meant to enact something other than a standard time bar." *Kwai Fun Wong*, 135 S. Ct. at 1632. *Rodriguez* did not employ the required presumption and did not follow the prescribed analytical approach; therefore, the issue of whether the filing deadline in Article 67(b) is jurisdictional must be revisited.

A*micus curiae* acknowledges that the *Kwai Fun Wong*, *Shinseki*, and *Thaler* decisions do not turn on an analysis of legislative history to answer the question of whether a given statute is clearly jurisdictional. Nonetheless, as regards Article 67(b), legislative history bolsters a conclusion that Congress framed Article 67(b) as a mere "claims processing" rule, with no intent to limit this Court's adjudicative power under Article 67(a). *See Rodriguez*, 67 M.J. at 117 (Effron, C.J. dissenting).

The original version of Article 67(b) allowed an accused 30 days to appeal, but contained no language limiting the adjudicatory power of a Court of Military Appeals if the appeal was not timely filed. Act of May 5, 1950, ch. 169, art. 67(c), 64 Stat. 107, 129-30 (1950). Subsequent to passage, courts interpreted the time limitation text of Article 67 and the legislative history as allowing late filing of a petition. *Rodriguez*, 67 M.J. at 116-120 (Effron, C.J. dissenting)(citing *United States v. Ponds*, 1 C.M.A. 385, 386 (1952) and its progeny). Congress was surely aware of that existing case law when, in 1981, it reexamined Article 67(b). 95 Stat. 1088-89 (1981). Even with that knowledge, Congress' amendment in 1981

did not contain any *Kwai Fun Wong* "something special" language to indicate a desire to curtail this Court's adjudicative authority. Instead, Congress used a title for that public law showing an intent to proscribe a "claims processing" rule, and dispelling any argument that it harbored intent to impose a "drastic" jurisdictional bar: "Constructive Service of Court of Military Reviews Decisions." PL 97–81 (HR 4792), PL 97–81, November 20, 1981, 95 Stat 1085. The "claims processing' language which followed that heading still exists in Article 67(b) today.

Congress had the opportunity to impose a jurisdictional bar, but chose not to. Thus, the legislative history supports a conclusion that Article 67(b) is not a jurisdictional provision, but is instead a claims processing rule, subject to equitable tolling given the "drastic" consequences involved with this Court refusing to even entertain a late-filed petition for review.

The text, context, and legislative history of Article 67(b), UCMJ, 10 USC § 867(b) evidences no Congressional intent to foreclose this Court's consideration of untimely-filed petitions. Accordingly, "this Court should be last, not first, to close the courtroom door to members of the armed forces." *Rodriguez*, 67 M.J. 110, 120 (Baker, J. dissenting)(citations omitted).

WHEREFORE, this Honorable Court should find it has jurisdiction to entertain Appellant's petition.

Very Respectfully Submitted,

ISAAC C. KENNEN, Major, USAF[3]
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 34153
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762-6604
(240) 612-4770
isaac.c.kennen.mil@mail.mil

BRIAN L. MIZER
Senior Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 33030
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762-6604

PATRICK J. WELLS, Colonel, USAF
Chief, Appellate Defense Division
U.S.C.A.A.F. Bar No. 30364
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762-6604

Counsel for *Amicus Curiae*

[3] Pursuant to Disciplinary Rule (DR) 7-106(B)(2) of the ABA Model Code of Professional Responsibility, Major Kennen avers as follows: He prepared this brief. He does not and has never represented Appellant. Further, he was deployed from 21 April 2014 until 1 October 2014 to NATO/ISAF Kandahar Airfield Command Headquarters, Afghanistan, and, as such, was not part of the Appellate Defense Division at the time the filing in this case was missed. Accordingly, he is untainted by any potential conflict of interest. This filing is the conflict-free independent position of the Air Force Appellate Defense Division.

CERTIFICATE OF COMPLIANCE WITH RULE 26(d)

1. This pleading complies with the type-volume limitation of Rule 26(d) because:

X	This pleading contains 7 pages, not including the signature blocks (certificates) of counsel.

and

X	This pleading contains 1,701 words.

and

X	This pleading contains 197 lines of text.

2. This pleading complies with the typeface and type style requirements of Rule 37 because:

X	This brief has been prepared in a monospaced typeface using Microsoft Word 2007 with 12 characters per inch and Courier New type style.

Very Respectfully Submitted,

ISAAC C. KENNEN, Major, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 34153
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762-6604

Counsel for *Amicus Curiae*

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court, to Counsel for Appellant, and to the Air Force Government Trial and Appellate Counsel Division, on 25 June 2015.

Very Respectfully Submitted,

ISAAC C. KENNEN, Major, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 34153
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762-6604

Counsel for *Amicus Curiae*